

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2142

To be argued by
RODGER C. FIELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2142

MICHAEL P. FERRARA,

Petitioner-Appellant,

—against—

THE UNITED STATES OF AMERICA,

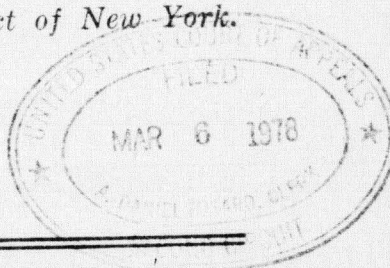
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

HARVEY M. STONE,
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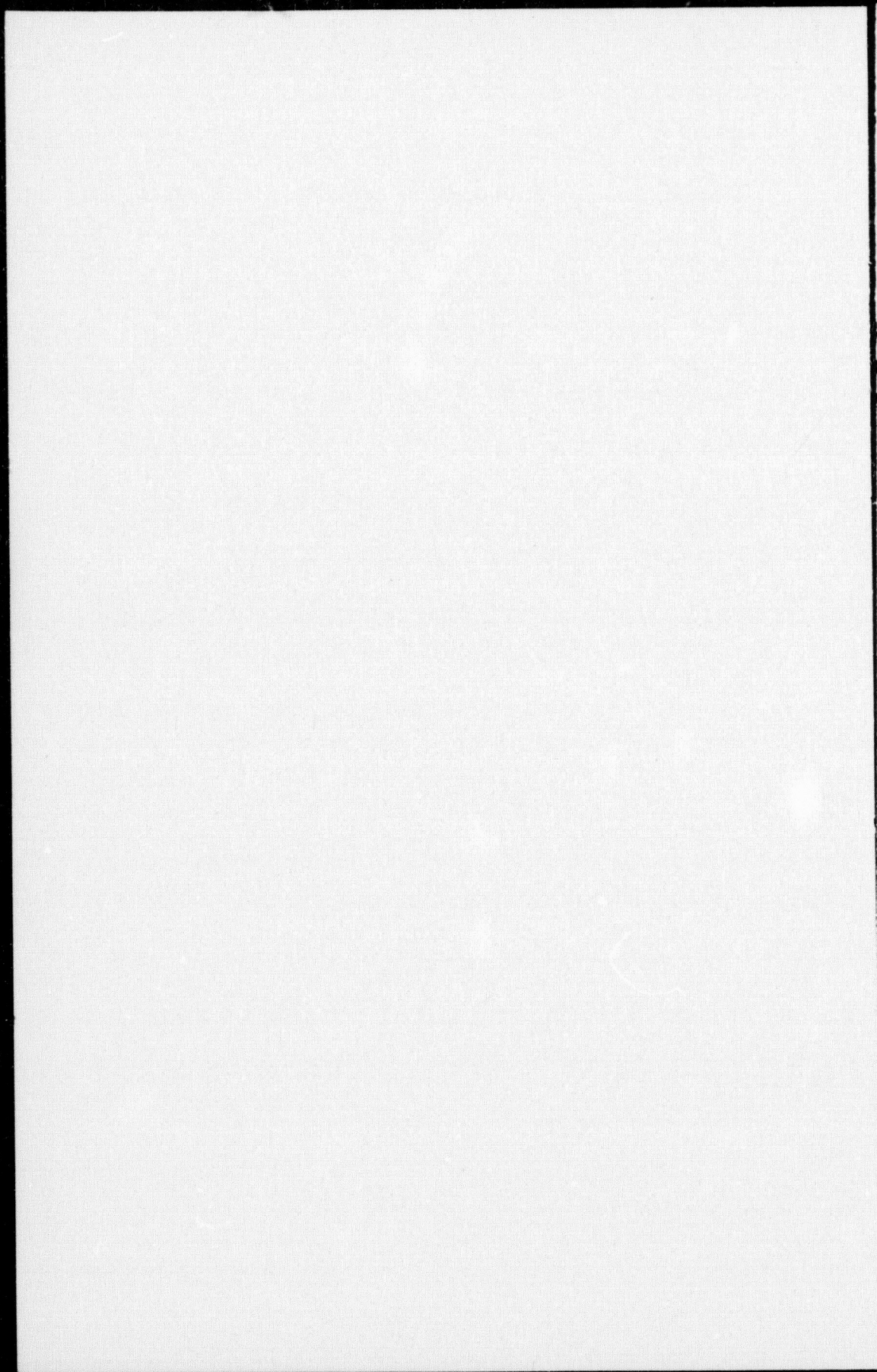


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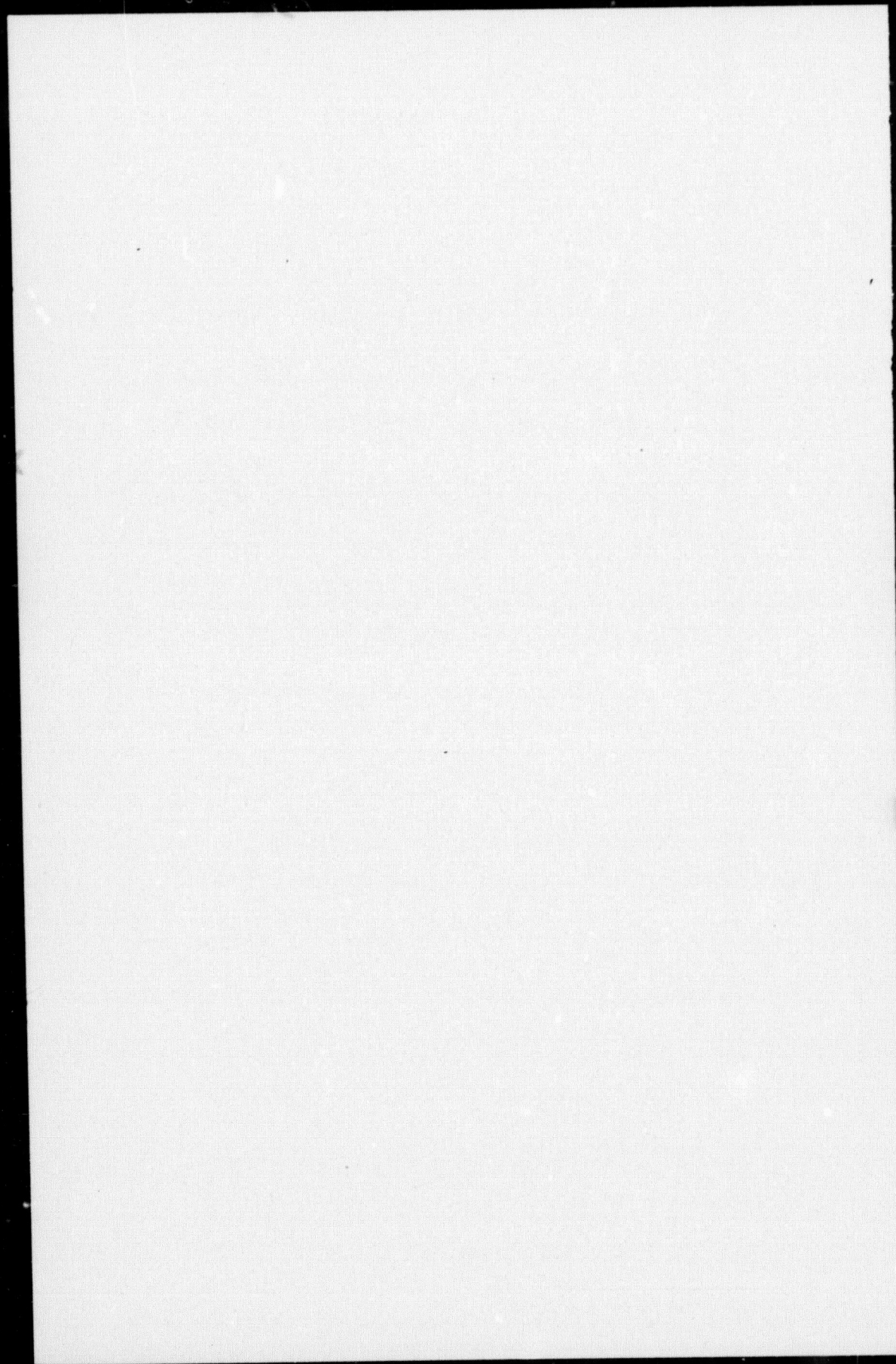
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2142

MICHAEL P. FERRARA,
Petitioner-Appellant,
—against—

THE UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

Petitioner-appellant, Michael P. Ferrara—who is currently serving terms of imprisonment following his conviction by guilty plea to three counts of bank robbery (18 U.S.C. § 2113(a))—appeals from the denial of his petition for relief pursuant to 28 U.S.C. § 2255. In a Memorandum and Order (94a-107a)¹ entered on September 20, 1977, the Honorable Thomas C. Platt, United States District Judge for the Eastern District of New York, denied without a hearing, Ferrara's *pro se* petition to vacate his sentence and withdraw his guilty plea. Upon application for rehearing made by Ferrara's retained counsel, the District Court adhered to its earlier decision denying the petition (see Memorandum and Order dated October 20, 1977). This appeal follows.

¹ Numerical references are to appellant's appendix.

In support of his claim for relief, Ferrara contends here that his guilty plea was induced by representations that he would receive a more lenient sentence than his co-defendant's; that he should have been placed under oath during the "Rule 11 inquiry"; and that there was no factual basis for the plea.

Statement of Facts

On March 15, 1976, Michael P. Ferrara was indicted on two counts of bank robbery (76 CR 190). Thereafter, a superseding indictment charging him with four counts of bank robbery (76 CR 190(S)) and an additional indictment charging him with six counts of bank robbery (76 CR 471) were also filed.

On October 5, 1976, Ferrara withdrew his previously entered pleas of not guilty to these charges, and entered a plea of guilty to the first and third counts of the superseding indictment, 76 CR 190(S), and to the first count of indictment 76 CR 471. Each of these counts charged a violation of Title 18, United States Code, Sections 2113(a) and 2. On January 11, 1977, Ferrara was sentenced to concurrent terms of eighteen years on the two counts of indictment 76 CR 190(S), plus a fine of \$5,000.00 on each of these counts. He was also sentenced to a term of seven years on Count One of indictment 76 CR 471, the sentence to run consecutively with that imposed under the superseding indictment, plus an additional fine of \$5,000 on this count.

In July of 1977, Ferrara filed a *pro se* petition requesting, *inter alia*, to withdraw his plea of guilty (9a-27a).² This petition, which was treated as one made

² A prior petition for reduction of sentence had also been made by Ferrara. This was denied by the District Court by a Memorandum and Order, dated April 27, 1977.

pursuant to Title 28, United States Code, Section 2255, was denied by a Memorandum and Order of the District Court, dated September 20, 1977 (94a-107a). A Motion for Reconsideration, made by Ferrara's retained attorney, was similarly denied by the District Court on October 20, 1977.

In his opinion below, Judge Platt addressed each issue raised in the petition. Only one of the contentions originally raised in the petition has been pressed on this appeal, *i.e.*, whether Ferrara is entitled to a hearing on his allegation that his attorney had informed him of an agreement with the prosecution that would result in his receiving a lesser sentence than that of a co-defendant, Savich. In concluding that such representations were not made or, alternatively, that Ferrara did not rely on them, Judge Platt observed (*inter alia*) that Ferrara's allegations were contradicted by statements made in open court at the time the plea was entered—both by Ferrara himself and by the prosecutor, who stated that he would recommend consecutive sentences on the charges to which Ferrara was pleading guilty.

The remaining issues raised on this appeal—whether appellant should have been placed under oath during the examination conducted pursuant to Rule 11 of the Federal Rules of Criminal Procedure and whether there was a factual basis for the plea—were properly raised for the first time upon the Motion for Reconsideration below (105a, n.6). These contentions also were rejected by the District Court.

ARGUMENT**POINT I****Ferrara's Petition Was Properly Denied By The District Court.****A. Ferrara is not entitled to have his plea vacated on the ground that he was not put under oath during the Rule 11 inquiry.**

Ferrara argues first that his guilty plea should be set aside because he was not placed under oath during the hearing conducted pursuant to Rule 11 of the Federal Rules of Criminal Procedure. This claim is meritless.

Rule 11, by its terms, does not require that a defendant's statements be under oath; it merely requires that "if" a defendant answers questions about the offense "under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement". Rule 11(c)(5), F.R. Crim. P. This Court has recognized that "the district courts in this circuit do not follow the custom of placing the defendant under oath before questioning him in connection with the acceptance of his guilty plea". *United States v. Journet*, 544 F.2d 633, 637 n. 6 (2d Cir. 1976). This Court has also recently held that a Rule 11 inquiry is not defective because of a failure to put the defendant under oath or, in the event of such failure, to warn him of a possible perjury prosecution. *United States v. Journet*, *supra*; *United States v. Michaelson*, 552 F.2d 472, 477 (2d Cir. 1977); *United States v. Saft*, 558 F.2d 1073 (2d Cir. 1977). Even assuming that this circuit's practice is deficient, Ferrara cannot reasonably maintain that the failure to place him under oath was an error of constitutional dimension entitling him to

collateral relief. See *Del Vecchio v. United States*, 556 F.2d 106 (2d Cir. 1977).³

B. There is no need for a hearing on Ferrara's allegations that he was induced to plead guilty by his attorney's representations regarding the sentence.

Ferrara also argues here, as he did below, that he was induced to plead guilty by his counsel's representations that, as a result of an agreement with the United States Attorney's Office, he would receive a lesser sentence than a codefendant who had previously pled guilty. This argument was properly rejected, without a hearing, on the basis of the record before the District Court.

It is recognized that allegations that a guilty plea was induced by false representations or promises made by defendant's counsel or the prosecutor may, in appropriate circumstances, require an evidentiary hearing. For example, in *Machibroda v. United States*, 368 U.S. 487 (1962) and *Blackledge v. Allison*, — U.S. —, 97 S.Ct. 1621 (1977), the Court held that an evidentiary hearing was required where guilty pleas were taken without a proper inquiry on the record into the voluntariness of the pleas or the existence of any promises made to the defendant and where the petition contained detailed factual allegations regarding the promise or representations made to the defendant. And in *Fontaine v. United States*, 411 U.S. 213 (1973), where the petitioner claimed that a guilty plea had been coerced by physical abuse and illness,

³ It should also be noted that even in the Fifth Circuit, where the Court of Appeals has imposed a rule requiring that a Rule 11 examination be under oath *Bryan v. United States*, 492 F.2d 775 (5th Cir.), cert. denied, 419 U.S. 1079 (1974), failure to do so does not alone mandate reversal. *United States v. Maggio*, 514 F.2d 80 (5th Cir.), cert. denied, 423 U.S. 1032 (1975).

the Court held that even where the trial judge has conformed to Rule 11 of the Federal Rules of Criminal Procedure, an evidentiary hearing is required unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief * * *" (*Id.* at 215).

It is clear from the face of the record here that Ferrara's allegation does not warrant a hearing. His plea of guilty was entered only after a thorough examination conducted by the District Court in accordance with Rule 11; F.R. Crim. P. (60a-76a). During the course of this examination, the following exchange took place (70a-74a):

The Court: Have any promises of any kind, including any promise or suggestion as to what sentence will be imposed, been made to you by anyone in the United States Attorney's Office, other than that at the time of sentence the remaining counts of these two indictments will be dismissed?

The Defendant: No, Your Honor.

The Court: Have any promises of any kind, including any promises or suggestions as to what sentence will be imposed been made by your lawyer or by this Court or by anyone else to induce a plea of guilty from you?

The Defendant: No, Your Honor.

The Court: Has your lawyer expressed any opinion or made any prediction as to what sentence the Court will impose?

The Defendant: Predictions?

The Court: Yes?

The Defendant: Not really, really wide predictions.

The Court: But he hasn't made any prediction what sentence will be imposed?

The Defendant: No.

The Court: Have you been threatened or coerced by anyone into entering a plea of guilty?

The Defendant: No.

The Court: Are you pleading guilty voluntarily and of your own free will because you are guilty and for no other reason?

The Defendant: Yes, Your Honor.

* * *

Mr. Kimelman [Assistant United States Attorney]: Your Honor, I would like to state for the record at this time, so it is clear in front of the defendant, that the United States will depart from its usual procedure of standing mute at sentencing and take a position at the sentencing of this individual.

Mr. Coiro [Defense Counsel]: Mr. Kimelman—

Mr. Kimelman: And I will also state for the record we will recommend consecutive sentences.

The Court: You are aware of that?

Mr. Coiro: Mr. Kimelman has made me aware of the fact that he would make such a statement to Your Honor on the date of sentence.

The Court: Given those facts do you wish to change your mind in any way, Mr. Ferrara?

The Defendant: No, Your Honor.

The Court: You understand this is different than their usual policy?

The Defendant: Yes, I do.

The Court: And you have no objection?

The Defendant: No.

Thus, as the District Court found (97a), Ferrara's "claim is directly contrary to his statements made at the time of the plea". His claim is further undermined by the failure of the defense counsel or the prosecutor to contradict Ferrara's representations. Appellant's solemn declarations in open court must, of course, be given great weight. As the Supreme Court stated in *Blackledge v. Allison*, *supra*:

"Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."
— U.S. —, 97 S. Ct. at 1629.

Ferrara's bare-boned contradiction of his open-court statements in his petition does not establish his right to a hearing, and numerous courts have so held in similar contexts. In *Bryan v. United States*, 492 F.2d 775 (5th Cir.) *cert. denied*, 419 U.S. 1079 (1974), for example, the Court of Appeals for the Fifth Circuit affirmed the denial, without a hearing, of a petition alleging misrepresentations of counsel. The Court stated (492 F.2d at 780):

"It is one thing to hold that a petitioner facing files and records that are silent on the subject of plea bargaining is entitled to develop a charge that a police official or prosecutor bargained not only for his plea but for concealment of the bargain itself. It is a wholly different thing to say that a district judge must accord a hearing to a petition which advances, not the suppression of an unraised fact, but the utterly incredible assertion that all the former official proceedings in his cause were no

more than a stultifying charade in which justice was mocked by every participant—even the judge himself. No proceeding, not a single conceivable one, would enjoy the finality that decisional law must have to maintain its credence.”

See *Michel v. United States*, 507 F.2d 461, 464 (2d Cir. 1974) (“when a defendant, represented by and in the presence of counsel, states that he does understand the meaning and consequences of a plea of guilty, we see no need for further inquiry. * * * In the absence of detailed evidentiary facts, no hearing is required”). See, similarly, *United States v. Williams*, 536 F.2d 247 (8th Cir. 1976); *Hedman v. United States*, 527 F.2d 20 (10th Cir. 1975); *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975); *Moody v. United States*, 497 F.2d 359 (7th Cir. 1974); *O’Neil v. United States*, 486 F.2d 1034 (2d Cir. 1971); *United States v. Miranda*, 437 F.2d 1255 (2d Cir. 1971).

Furthermore, the record itself indicates that, far from agreeing to reduce Ferrara’s sentence, the Assistant United States Attorney went on record to state that he would depart from the usual practice of standing mute at the time of sentencing, and would recommend consecutive sentences (73a-74a). This open-court statement makes Ferrara’s claim that he relied upon representations of an agreement with the United States Attorney’s Office all the more unbelievable. Even after the statement of the Assistant United States Attorney, Ferrara asserted that he did not wish to change his mind with regard to his guilty plea and that he had no objection to this procedure (74a). Whatever reliance (if any) Ferrara might have placed on representations of an “agreement” with the government could not possibly have persisted after these statements. Accordingly, the evidence in the record conclusively refutes the allegation contained in the petition.⁴

⁴ And, as the district court observed (97a), even “assuming *arguendo* that [Ferrara’s] counsel did tell him that he would

[Footnote continued on following page]

Further, Ferrara's petition did not meet the requirements of specificity. The District Court correctly observed (98a-99a): "[Ferrara] has not established with sufficient specificity when or where the alleged promise was made, nor has he alleged that there were any witnesses to the promise." Thus, Ferrara has totally failed to provide the detailed factual allegations necessary to establish his right to a hearing. No affidavit from his attorney, nor an explanation for its absence, has been provided. See *Del Vecchio v. United States*, *supra*, 556 F.2d at 112. All that has been submitted is a one-sentence conclusory allegation of a representation made by Ferrara's attorney of an agreement with the United States Attorney's Office that Ferrara would receive a lesser sentence than a co-defendant (23a).⁵ Under the law as set forth above, Ferrara is not entitled to a hearing in these circumstances.⁶

In *Machibroda v. United States*, *supra*, where no Rule 11 examination had been conducted to inquire into the existence of any promises made to the petitioner, the Supreme Court stated: "There will always be marginal

receive less time than his co-defendant, such a statement amounted to nothing more than a mere estimate and does not entitle [Ferrara] to the relief requested". See *United States ex rel. Hill v. Ternullo*, 510 F.2d 844 (2d Cir. 1975), and cases cited therein.

⁵ Elsewhere in his petition, Ferrara also asserted that "Counsel of record advised movant to answer: (NO) as to the Courts question: BUT HE HASENT (sic) MADE ANY PREDICTION WHAT SENTENCE WILL BE IMPOSED" (12a).

⁶ As the District Court also found (99a-100a) after reviewing the uncontested facts in Ferrara's pre-sentence report, Ferrara has an extensive record of criminal convictions; he has admitted to participating in twelve bank robberies, and there is strong evidence linking him to 18 bank robberies. The Court found (100a) that these circumstances further belied Ferrara's claim since he could not possibly have "belie[ved] that he would receive a prison term of 'far less time than that of the twenty-five years' as he alleges".

cases, and this case is not far from the line" 368 U.S. at 496. There can be little doubt that the present case is well beyond the line. To require a hearing on the present petition will, as a practical matter, mandate a hearing for any defendant, who, dissatisfied with his sentence, alleges misrepresentations of counsel. Such a holding would render meaningless one of the purposes of the Rule 11 examination—to expose the existence of such promises or representations. Undoubtedly to avoid this result, the Supreme Court in *Blackledge v. Allison*, *supra*, stated that conclusory allegations and allegations that in the face of the record are not credible are subject to summary dismissal. It is difficult to imagine a more clear-cut case calling for the application of this standard than that which is presented here.⁷

C. There was a factual basis for Ferrara's plea.

Finally, Ferrara asserts that there was an inadequate factual basis for the plea. We note preliminarily that, in order to prevail on this claim by way of collateral attack, Ferrara must show "prejudice affecting the fairness of the proceedings or the voluntariness of the plea". *Del Vecchio v. United States*, *supra*, 556 U.S. at 111. Ferrara falls far short of meeting this burden.

Ferrara did not even allege in his petition that he did not actually commit the acts he was charged with; nor did he allege that he did not know that his acts constituted the offense of bank robbery. Indeed, the petition itself does not even mention the lack of a factual basis for the plea, let alone allege any prejudice resulting from the

⁷ This is not to argue for a *per se* rule against evidentiary hearings. Where detailed, specific affidavits have been provided, courts have required a hearing. See, e.g., *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308 (2d Cir. 1963). Also, see generally, cases cited in *Blackledge v. Allison*, *supra*, 97 S. Ct. at 1629, n.5.

alleged lack of a factual basis. Ferrara's contention that there was an inadequate factual basis for the plea is, at most, an attempt to isolate a technical error in the Rule 11 proceedings which neither affects the fairness of the proceedings nor prejudices the defendant. This is exactly the type of claim which the Court has held may not be raised on a collateral attack. *Del Vecchio v. United States, supra*.

Moreover, there was, in fact, an ample factual basis in the record to support the plea. Not only did Ferrara admit that he actually did what he was charged with (68a), but the District Court also, in accordance with *Santobello v. New York*, 404 U.S. 257 (1971), elicited, in Ferrara's own words, what he did (69a-70a). This clearly established the factual basis for the plea.

Ferrara's argument here that there is no showing in the record of the use of force, violence or intimidation in committing the robbery is incorrect. Ferrara admitted doing the crimes he was charged with, which had been repeatedly explained to him as involving the use of force, violence or intimidation (66a-68a). Also, in the course of describing his actions, Ferrara admitted going into the banks with another individual, asking the tellers for all the money, moving around and taking the money from the bank drawers, putting it in a bag, and leaving (69a). There can be no real dispute that these actions, taken in context, amounted to bank robbery by "intimidation". Finally, the Assistant United States Attorney made an undisputed statement at the Rule 11 hearing that the government would offer proof that a weapon was displayed by Ferrara's accomplice in each of the banks (70a). Viewing this record as a whole, then, it is obvious that the factual basis for the plea was clear and indeed, more than ample. *Cf. Kloner v. United States*, 535 F.2d 730, 734 (2d Cir. 1976); *Seiller v. United States*, 544 F.2d 554, 565 (2d Cir. 1975).

CONCLUSION

**The District Court's denial of appellant's petition
should be affirmed.**

Dated: Brooklyn, New York
March 1, 1978

Respectfully submitted,

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HARVEY M. STONE,
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(Of Counsel).*

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Roger Field

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of March 1978 he served a copy of the within Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Robert Augustus Harper, Jr., Esq., 735 E. University Ave. P.O. Box 804,
Gainesville, Fla. 326060

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Brooklyn Street~~, Borough of Brooklyn, County of Kings, City of New York.

Roger Field

Sworn to before me this

3rd day of March 1978
Barbara Allen
BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979

